

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.767 OF 1981

B.C. Mody Export Private Limited.)
a Company registered under the)
Companies Act 1 of 1956 and having)
its registered office at Khetan Bhavan,)
5th floor, 198 J. Tata Road,)
Churchgate, Bombay 400 020.)...Plaintiffs

V/s.

Federal Bank Ltd., a Banking)
Company registered and incorporated)
under the Companies Act 1 of 1956 and)
having its registered office at Alwaye)
683-101, Kerala and office at 11,)
J.S.V. Road, Super Shopping Centre,)
Andheri (West), Bombay 400 058.)...Defendant

Ms.K.C. Nichani for Plaintiff.
Ms.J.M. Sidhwa i/b. Kadwani & Co. for Defendants.

CORAM : A.S. AGUIAR, J.
DATED : OCTOBER 16, 2004

ORAL JUDGMENT :-

1. The plaintiffs are seeking a decree against the defendants for a sum of Rs.61,000/- alongwith interest at the rate of 18% p.a. on the principal amount of Rs.40,000/- from the date of filing of the suit till payment as per particulars of claim annexed at Exhibit-E to the plaint. The principal amount claimed by the

plaintiffs is the amount wrongful paid by the Defendant Bank to P.S. Surana, the sole proprietor of Mahesh Enterprises, defendant no.2 (now deleted) by crediting the account of the 2nd defendant in the bank of 1st defendant despite instructions to the contrary by the plaintiffs. It is the case of the plaintiffs that a contract was entered into between the plaintiffs and original defendant no.2 for supply to the plaintiffs of 50 cases of bicycle rivets for a sum of Rs.3 lakhs. That the plaintiffs was required to pay Rs.40,000/- to the said defendant no.2 being part payment on delivery of the goods and the balance amount of Rs.2,60,000/- was to be paid by the plaintiffs to defendant no.2 after exporting the goods and realising the sale proceeds.

2. It is the case of the plaintiffs that as per agreement between the plaintiffs and 2nd defendant, the plaintiffs instructed their bankers Algemene Bank Nederland, NV by letter dated 26th April, 1998 to make out a Reserve Bank of India cheque for Rs.40,000/- in favour of defendant no.1. The said cheque was to be credited to the account of the plaintiffs until further instructions were received from the plaintiffs vide letter/Memo dated 26th April, 1978, Exhibits 'P-10' and

'P-11'. This was in view of the fact that the plaintiffs intended that the said amount should be retained by the first defendant Bank till all goods were supplied by the defendants to the plaintiffs as per conditions and only after that defendant no.1 would be instructed to pay the amount to defendant no.2.

3. Accordingly, plaintiffs' bank, Algemene Bank Nederland, obtained R.B.I.'s cheque for Rs.40,000/- in favour of the first defendant and also addressed letter dated 26th April, 1978 requiring the Bank to pay the amount of Rs.40,000/- to the account of the plaintiffs.

4. It is the case of the plaintiffs that on 27th April, 1978, Mr.Surana, 2nd defendant, approached Mr.S.V. Randive, Export Executive of the Plaintiffs' company and requested him to handover the said R.B.I. cheque and the letter enclosing the same to the 1st defendant. The plaintiffs had by letter dated 26th April, 1978 requested the said Algemene Bank Nederland to handover the said letter to the defendant no.1 bank alongwith said cheque for the purpose of being delivered to the 1st defendant. Accordingly, Mr.Randive showed defendant no.2 original letter dated 26th April, 1978

addressed by Algemene Bank Netherland to 1st defendant enclosing R.B.I. cheque for Rs.40,000/- . Thereupon, Mr.Surana, sole proprietor of the 2nd defendant represented to the plaintiffs that they were in financial difficulties and wanted the said documents to show them to their creditors for satisfying them that they were going to receive Rs.40,000/- within a short time. Mr. Surana requested Shri Randive to hand over the said cheque of Rs.40,000/- and the covering letter of Algemene Bank addressed by the 1st defendant to him. Believing the representation of the 2nd defendant, Mr.Randive agreed to handover the said documents to 2nd defendant and requested one Budh Singh Ahir, an employee of the plaintiffs company to go alongwith the 2nd defendant to the first defendant's office to deliver the same. Accordingly, the said Budh Singh Ahir accompanied by Shri Surana went to the Andheri office of the first defendant Bank where he was introduced to the Manager R.S. Karta. Budh Singh Ahir told Shri Karta that the first defendant bank i.e. Federal Bank should keep the said sum of Rs.40,000/- being proceeds of the Reserve Bank of India cheque to the credit of the plaintiffs and that the said amount should not be disposed of until proper instructions were given by the plaintiffs to the

Algemene Bank Nederland. The original letter of the Algemene Bank Nederland addressed to the 1st defendant was also handed over alongwith Reserve Bank of India cheque of Rs.40,000/- to Shri Karta. The said Budh Singh Ahir also informed Shri Karta that the said defendants had agreed to supply the goods worth Rs.3 lakhs and an amount of Rs.40,000/- should be paid to the 2nd defendant only after the goods were supplied in satisfactory condition. According to the plaintiffs, said Karta agreed to comply with the instructions contained in the letter of Algemene Bank Nederland.

5. It is the case of the plaintiffs that as the 2nd defendant had not supplied goods of the required quality, the plaintiffs wrote a letter dated 30th June, 1978 to Mr.Randive, the 1st defendant Bank reiterating that the amount of Rs.40,000/- lying to the credit of the plaintiffs was not to be passed on to any one without the consent in writing from the plaintiffs company. The said letter is Exhibit-C to the plaint, Exhibit 'P-3'. The said letter dated 30th June, 1978 makes reference to the Memo dated 26th April 1978 sent by the Algemene Bank Nederland to defendant no.1. First defendant by their letter dated 4th July, 1978

wrote to the plaintiffs denying the receipt of Memo dated 26th April, 1978 of the Algemene Bank Nederland and stated that they had only received the cheque for Rs.40,000/- from the 2nd defendant and that he had passed on the credit to them i.e. defendant no.2. The said letter is at Exhibit-D to the plaint. Thereafter, there was some correspondence between the plaintiffs and defendant no.1. Plaintiffs contended that the first defendant held the amount of Rs.40,000/- for and on behalf of the plaintiffs. The 1st defendant Bank denied holding any amount for and on behalf of the plaintiffs. Budh Singh Ahir of the plaintiffs filed complaint before the Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay, against Mr.R.S. Karta, Manager of 1st defendant bank and Mr.Surana, proprietor of defendant no.2 charging them for offences under Section 420 and 409 of the I.P.C. read with Section 34 and 120-B of IPC. The learned Magistrate issued summons. Respondent i.e. defendant no.1 went in revision for quashing of the said proceedings. At the time of hearing, learned Advocate for defendant no.1 stated that the defendant's proceedings have been quashed by the High Court. The order is at Exhibit 'D-4'. Defendant no.1 has filed its written statement

sworn by one Xavier George, Branch Manager, Andheri Branch.

6. It is the case of the defendant no.1 that they have nothing to do with the transaction between the plaintiffs and defendant no.2 and that the defendant no.1 has been unnecessarily impleaded as party defendant. Defendant no.1 has also pointed out that Shri Yashwant T. Surana, the sole proprietor of the Defendant no.2 firm has expired on or about 18th April, 1980 i.e. prior to the filing of the suit and that since the lis was mainly between plaintiffs and defendant no.2, the suit was liable to be dismissed having been filed against a dead person. The plaintiffs, therefore, applied to the Court for dropping defendant no.2 and by order dated 7th August, 2002, the plaintiffs were allowed to amend the plaint by deleting defendant no.2 which had accordingly been done. Defendant no.1 has denied that pursuant to transaction between the plaintiffs and defendant no.2, plaintiffs had instructed their Bankers to make out the R.B.I. cheque for Rs.40,000/- in favour of the defendant no.1 and to hand over the same to defendant no.1. Defendants also do not admit that the plaintiffs had instructed

them that the said amount was to be retained by defendant no.1 on behalf of the plaintiffs till all the goods were supplied by 2nd defendant to plaintiffs in good condition. Defendants have also denied that they received any letter from the Algemene Bank or that the said Algemene Bank obtained the R.B.I. cheque for Rs.40,000/- in favour of defendant no.1 Federal Bank. Defendants further state that the letter dated 26th April, 1978 and the cheque were not delivered to the defendants' office at all. It is the specific case of the defendant no.1 that Budh Singh Ahir, the representative of Plaintiff and 2nd defendant in collusion did not deliver the alleged letter to defendant no.1 Bank and that 2nd defendant who was operating current account with the bank deposited the said cheque to be credited to his account in the said bank. The said cheque was deposited by the 2nd defendant in the said current account and as there were no instructions to the contrary, the proceeds of the said cheque after collection were credited by defendant no.1 to the current account of the 2nd defendant. The said defendants have denied that they have received letter dated 26th April, 1978 from the Algemene Bank and point out letter dated 20th August, 1981 addressed by

them to the Algemene Bank stating that they had not received Memorandum dated 26th April, 1978 and also enquired with the said Bank i.e. Algemene Bank whether they were holding any acknowledgement in respect of the said alleged delivery of the Memorandum to the defendant. The said Algemene Bank by its reply dated 7th September, 1981 stated that it had handover the R.B.I. cheque and Memorandum to the plaintiffs and they had not received any acknowledgement from defendant no.1 in that connection. It is specifically stated by the defendant no.1 that by letter dated 4th July, 1978, they had informed the plaintiffs that they had not received the letter dated 26th April, 1978 but received only the cheque for Rs.40,000/- from 2nd defendant and hence, defendant no.1 Bank has passed on credit to the 2nd defendant. The said defendants no.1 Bank has specifically denied that cheque of Rs.40,000/- was delivered by the 2nd defendant to defendant bank for being held for and on behalf of the plaintiffs as alleged. On the basis of the pleadings as aforesaid, Issues were framed as follows :-

1. Does the plaintiff prove that a cheque for Rs.40,000/- drawn by the Reserve Bank of India

in favour of the defendant (original defendant No.1) was handed over to it for the purpose of crediting to the account of plaintiff and to keep the same in the plaintiff's account until they receive instructions from plaintiff?

2. Does the plaintiff prove that without further instructions having been given, defendant no.1 cleared the cheque by making payment to original defendant no.2 (since deleted)?
3. Whether there is privity of contract between plaintiff and defendant?
4. Whether defendant is liable to pay amount of Rs.40,000/- along with interest as claimed in the suit to the plaintiff?
5. What order?
7. In support of its case, plaintiffs have examined one Balkrishna C. Mody, Director of the Plaintiffs Company who has set out the plaintiffs' case in his evidence and has been cross-examined by the defendants.

Defendants have not lead any evidence.

8. From the issues as framed, it is seen that if Issue no.1 is answered in the negative, then Issue no.2 will also have to be answered in the negative. If Issue no.1 is answered in the affirmative, Issue no.2 will also have to be answered in the affirmative. There are no pleadings giving rise to Issue no.3. Therefore, Issue no.3 need not be answered. Issue No.4 deals with consequential reliefs.

9. In the light of the pleadings, the entire controversy in the suit can be disposed of by a decision on the question whether defendants no.1 received memorandum dated 26th April, 1978 enclosing cheque for Rs.40,000/- in favour of defendant no.1.

10. It is the case of the plaintiffs as set out in the plaint as well as in the affidavit of evidence of plaintiffs witness that Memorandum which is at Exhibit 'P-11' alongwith cheque of Rs.40,000/- was collected by defendant no.2 from Shri Randive and the said defendant no.2 and one Budh Singh Ahir, an employee of the

plaintiff, went to the first defendant office for delivery of the said letter and cheque.

11. Defendant no.1 has specifically denied in their written statement that letter dated 26th April, 1978 and the cheque was delivered to the defendants' office. It is also the case of defendant no.1 that Budh Singh Ahir and 2nd defendant acting in collusion did not deliver the said letter to the defendant and that defendant no.2 who had a current account with defendant no.1 bank at Andheri Branch deposited the said cheque to be credited to his account. Since the said cheque was deposited by the 2nd defendant in his current account and in the absence of instructions, defendant no.1 Bank credited the proceeds of the said cheque after collection to the current account of 2nd defendant. Defendant no.1 Bank have by their letter dated 4th July, 1978 in reply to the plaintiffs' letter dated 30th June, 1978 specifically denied having received any memo from the Algemene Bank. They have also denied that the plaintiffs have deposited any cheque with them or kept any account with them for depositing the cheque. It is contended that the said draft/cheque was drawn in favour of the defendant no.1 Bank and as such the plaintiffs

had no claim or title in respect of the said cheque. The said letter dated 4th July, 1978 is annexed at Exhibit-D to the plaint. No doubt, the defendants have not lead any evidence. However, the letter dated 4th July, 1978 has been exhibited as 'P-16' as it is an admitted document submitted by the plaintiffs themselves and therefore, reliance can be placed on the contents of the said document.

12. On the other hand, learned Advocate for the plaintiffs contends that the fact that the letter/memo dated 26th April, 1978 was received by defendant no.1 is proved by the evidence of the plaintiffs' witness Mr.Balkrishna Mody who in para 16 of his evidence stated as follows :-

"16. The 2nd Defendants being bankers obviously knew and I was also informed that the Reserve Bank cheque of Rs.40,000/- was got issued by the Plaintiffs and was to be credited to their account only and was to be paid upon instructions being given by the Plaintiffs and also made clear by a covering letter/memo dated 26th April, 1978 addressed by Algemene Bank

Nederland NV to the 1st Defendants."

13. Clearly only on the basis of PW-1's statement in his affidavit in evidence, it cannot be said that the plaintiffs have proved that the letter/memo dated 26th April, 1978 was in fact received by the 1st defendant. It is the plaintiffs' case that one Ahir, their employee, under instructions of Shri Randive, also their employee, took the letter/Memo and the cheque and alongwith defendant no.2 went to defendant no.1 Bank's office and delivered the same to defendant no.1 bank. Neither Mr.Randive nor Mr.Ahir have been examined to prove this. Moreover, defendant no.2 has expired. The evidence of PW-1 is in the nature of hearsay and there is no explanation as to why plaintiffs have not examined either Mr.Ahir or Mr.Randive, thus, there is no evidence whatsoever to show that letter/memo dated 26th April, 1978 was received by defendant no.1 bank. In fact in his cross-examination, PW-1 has stated as follows :-

"I did not go to the bank to handover the letter and memo. My employees informed me about the meeting between Budhsingh Ahir and the Manager of the Federa Bank Mr.Karta. No covering letter

was given with the memo and original to the bank. I do not remember on which date Ahir went to the bank with defendant no.2 Surana."

Absolutely no evidence has been brought on record to even probablise that letter/memo dated 26th April 1978 was given to defendant no.1 bank. The plaintiffs being a company would certainly not have delivered any document to another person without obtaining an official receipt for the same. It is, therefore, difficult to accept that the the plaintiffs sent the letter to the defendant bank without obtaining receipt from defendant no.1 for the same. No doubt, cheque for Rs.40,000/- has been received by defendant no.1. But it is the case of the defendant that this cheque was not received directly by the bank from the plaintiffs. The said cheque was deposited by defendant no.2 with the said bank in the account of defendant no.2 and as such the defendant bank had no option but credit the account of defendant after collecting the proceeds of the said cheque. The absence of any evidence proving that the said memo dated 26th April, 1978 was received by defendant no.1 bank probablises the case of the defendant that neither the letter nor the said cheque was received by the bank and

that the said cheque was deposited by defendant no.2 into his account and that there was collusion between defendant no.2 and the employee of plaintiff viz. Shri Ahir. The non-examination of Shri Ahir requires drawing of an adverse inference against the plaintiffs and holding that the said cheque and the letter were not given to the defendant no.1 bank by defendant no.2 and Shri Ahir.

14. According to the plaintiffs the cheque was handed over by the plaintiffs alongwith memo with clear instructions to the defendant Bank not to part with the cheque unless they received instructions to the contrary from the plaintiffs. In other words, according to the plaintiffs defendant no.1 Bank had to hold the cheque in escrow till compliance by defendant no.2 of all terms of contract with the plaintiffs. However, plaintiffs witness has in his cross-examination admitted that he did not give any specific instructions to the defendant Bank to hold the cheque in escrow and on his attention being invited to Exhibit 'P-3', plaintiffs witness has stated, "There was no earlier communication in writing to the bank from the plaintiff to hold the cheque in escrow." Exhibit 'P-3' is letter dated 30th June, 1978

addressed by the plaintiffs to the defendant no.1 Bank instructing them not to part with the amount of cheque to any one without their express consent in writing. The said letter also states that the cheque for Rs.40,000/- has been deposited with the defendant Bank and that the Bank was directed by the Algemene Bank to keep the same at the disposal of the plaintiffs. The defendant Bank admits that the cheque has been encashed and the amount credited to the defendant's account with the defendant Bank. However, the date when the cheque was presented is not mentioned nor is any evidence produced by the defendant Bank to prove that the said cheque was encashed by defendant no.2 and credited to the account of defendant no.2.

15. Be that as it may, the fact remains that the cheque was received by the bank. Whether it was credited to the account of defendant no.2 Mahesh Enterprises or appropriated by the defendant no.1 bank to itself, is not clear. However, learned Advocate for the defendant Bank has referred to letter dated 26th April, 1978 addressed by S.V. Randive, Export Executive of the plaintiffs to Mahesh Enterprises, defendant no.2 which states as follows :-

"With reference to the above we are sending herewith a Bank draft No.461822 favouring Federal Bank Ltd., dated 26-4-1978 for Rs.40,000/- which may kindly receive in order and let us have your stamped receipt."

16. This letter which forms part of the order in High Court Criminal Appeal No.1243/1979 clearly indicates that the cheque was handed over by the plaintiffs to the defendant no.2 for receiving payment in connection with supply of 50 cases of bicycle rivets and for which he was asked to give a stamped receipt. It is thus apparent that the cheque was deposited by defendant no.2 with the bank and encashed by him. Though the defendant Bank has not produced any documentary evidence to show the receipt of the letter by defendant no.2, there is no reason to disbelieve the contents of this letter.

17. Learned Advocate for the plaintiffs objects to the letter being produced and considered by this Court on the ground that the order is passed in a criminal matter and that contents of a criminal order cannot be

looked into by the Court in a civil suit in view of Section 43 of the Evidence Act and this has been dealt with in the Judgment reported in the case of **Harihar Prasad Singh and others V/s. Mt. Janak Dulari Kuer and others reported in AIR 1941 Patna 118** and also in the case of **Krishnan Asari and Another V/s. Adaikalam and Others. reported in AIR 1966 Madras 425**. In view of the settled position, it is submitted that the judgment cannot be produced in a civil case and therefore, cannot be relied upon. On the other hand, learned Advocate for defendants refers to decision reported in **AIR 1974 Madras 14 in the case of Perumal V/s. Devarajan and Ors.** wherein the Court has held that a copy of criminal court judgment is admissible in civil proceedings to the extent of factum of charge and conviction. Frankly, we are not concerned with the contents of Criminal Appeal No.1243/79 produced by the defendants except for the letter dated 26th April, 1978 from the plaintiffs to defendant no.2 Mahesh Enterprises which becomes a public document as it has been referred to in a judgment of the Court. The said letter clearly indicates that the cheque was handed over to the Defendant no.2 by plaintiffs towards payment for the supply of the said bicycle units. Thus, establishing the fact that the

defendants bank has paid the amount of cheque to defendant no.2.

18. As set out earlier in this para, plaintiffs have failed to establish the receipt by Defendant Bank of Memo dated 26th April, 1978 which allegedly instructs the Bank to keep the amount of Rs.40,000/- at the disposal of the above-mentioned party i.e. the plaintiffs B.C.Mody Export Pvt.Ltd. Furthermore, the plaintiffs witness has, on his attention being invited to 'P-3', stated that there was no earlier communication in writing to the bank from the plaintiffs to hold the cheque in escrow. Letter Exhibit 'P-3 is dated 30th June, 1978 while the letter relied upon in the Judgment of the Criminal Court in Criminal Appeal is dated 26th April, 1978. Thus, it is seen that the plaintiffs have failed to prove that the defendant bank had received instructions from the plaintiffs not to part with the cheque to either defendant no.2 or any one else without prior instructions from the plaintiffs to the defendant company. Thus, Issue no.1 is answered in the negative and consequently, issue no.2 is also answered in the negative and in view of the above findings, Issue no.4 must also be answered in the negative. Order

accordingly.

. Suit dismissed and disposed of. No order as to
costs.

(A.S. AGUIAR, J.)